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IN THE

Supreme Court of the United States

No. 70-5082

LAVERNE CARTER, *et al.*,
Appellants,

v.

WAYNE STANTON, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

REPLY BRIEF FOR APPELLANTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF FOR APPELLANTS

Appellee William Sterrett ("appellee") has questioned the jurisdiction of this Court to hear this appeal under 28 U.S.C. § 1253. Citing *Wilson v. Port Lavaca*, 391 U.S. 352 (1968) and *Mengelkoch v. Industrial Welfare Commission*, 393 U.S. 83 (1968), appellee argues that the decision of the District Court herein was equivalent to a dissolution of the three-judge panel as improperly convened and that, therefore, this appeal should have been taken to the United States Court of Appeals for the Seventh Circuit. These arguments misconstrue the nature of the District Court's judgment in an effort to bring it within the rule of the *Wilson* and *Mengelkoch* cases and overlook the substantial

distinctions between those decisions and the present case. Appellee also contends, without citation of authority, that the judgment herein was not an "* * * *order* granting or denying * * * an interlocutory or permanent injunction * * *," as required by § 1253. This argument ignores a long line of recent cases in which this Court has accepted direct appeals from judgments of three-judge courts dismissing complaints.

I.

THE SUPREME COURT HAS JURISDICTION OVER THIS APPEAL SINCE A THREE-JUDGE COURT WAS PROPERLY CONVENED UNDER 28 U.S.C. § 2281.

The issue of whether a substantial constitutional question requiring the convening of a three-judge court under § 2281 is presented must be determined by the allegations of the complaint. *Ex parte Poresky*, 290 U.S. 30, 32 (1933). It is the duty of the single district judge before whom the action is pending to make an *initial* determination of this question. *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962); *Water Service Co. v. Redding*, 304 U.S. 252, 254 (1938). If the question is "fairly open to debate," however, a three-judge court must be convened. *Ex parte Poresky, supra.*

The jurisdiction of this Court of a direct appeal under § 1253 depends upon (1) whether the three-judge court entered an order granting or denying an injunction, *Mitchell v. Donovan*, 398 U.S. 427 (1970), and (2) whether the action, suit or proceeding was required to be heard and determined by three judges, or, as frequently stated, whether the three-judge court was properly convened. *Moody v. Flowers*, 387 U.S. 97, 99 (1967). The presence of the latter element is not determined by the nature of the decision rendered or by the way the facts turn out. *Florida Lime Growers v. Jacobsen*, 362 U.S. 73 (1960); *Mosher v. City of Phoenix*, 287 U.S. 29 (1932). As stated in *United States*

v. Georgia Pub. Serv. Comm'n., 371 U.S. 285, 287-88 (1963):

> "Once convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court."

A. A Direct Appeal Is Not Foreclosed Where A Three-Judge Court Dismisses A Case For Want Of A Substantial Constitutional Question.

The District Court in *Wilson v. Port Lavaca*, 285 F. Supp. 85 (S.D. Tex. 1968) held that, since neither defendant enforced or executed a state statute and since no attack was made upon the constitutionality of a state statute, the plaintiff's claim was not "one which must be heard by a three-judge court." (285 F. Supp. at 87) The court then proceeded to rule that either equitable or declaratory relief would be inappropriate and dismissed the action, with the District Judge adopting this judgment as his own. Upon appeal to this Court, it was held that the situation was similar "to that which results when a single judge declines to convene a three-judge court and denies relief: an appeal lies to the appropriate United States Court of Appeals, and not to this Court." *Wilson v. Port Lavaca*, 391 U.S. 352 (1968). In *Mengelkoch v. Industrial Welfare Commission*, 284 F. Supp. 950 (C.D. Cal. 1968), the three-judge court granted a motion to dissolve on the ground that the complaint failed to present a substantial constitutional issue. The single district judge then dismissed the case under the abstention doctrine. Upon appeal, this Court held that, when "a three-judge court dissolves itself for want of jurisdiction, an appeal lies to the appropriate Court of Appeals * * *." *Mengelkoch v. Industrial Welfare Commission*, 393 U.S. 83-84 (1968). It is significant that the Court cited *Wilson* as direct authority for this proposition.

In each of the above cases, therefore, the three-judge courts expressly found that they had been improperly convened and expressly or by implication left the remaining

issues for adjudication by the single district judge. As a result, the only reviewable order in each instance was entered by the single district judge. No reviewable order was entered by the three-judge panel, and, hence, a direct appeal was not appropriate. To the contrary, the three-judge court here in no way expressed the view that *it* had no jurisdiction under 28 U.S.C. § 2281. All three judges signed the Entry (App. 212) dismissing the complaint. It is also significant that the three-judge panel, in addition, found that the statutory questions presented were insubstantial and proceeded to decide that there was no federal jurisdiction under 28 U.S.C. § 1343(3)(4). Thus, no issues were left for adjudication by the single judge.

In these circumstances, decisions of this Court subsequent to *Wilson* and *Mengelkoch* establish that a direct appeal is appropriate. In *Whitney Stores, Inc. v. Summerford,* 393 U.S. 9 (1968), decided after *Wilson* and two weeks before *Mengelkoch,* for example, the Court affirmed on the merits the dismissal of a case by a three-judge panel on the basis that no substantial federal question was involved. Similarly, in *Sullivan v. Alabama State Bar,* 394 U.S. 812 (1969) and *Watermeier v. Louisiana Stadium and Exposition District,* 398 U.S. 955 (1970) decisions of three-judge courts dismissing complaints, respectively, for failure to present a substantial constitutional question and for failure to present any federal constitutional question were affirmed on the merits. More recently, in *Gaytan v. Cassidy,* 403 U.S. 902 (1971) a similar three-judge court judgment was vacated and remanded on direct appeal. These cases demonstrate that, when a single district judge initially determines that a complaint raises a substantial constitutional question and a three-judge court is convened, this Court has jurisdiction over a direct appeal from a judgment of *that* court dismissing the case, even where the dismissal is based on a failure to present substantial federal questions.

B. Even If Wilson and Mengelkoch Apply To Three-Judge Court Judgments Of Dismissal, A Direct Appeal Is Proper Here Since The District Court Judgment Was Not A Poresky-Type Determination And Since An Extensive Evidentiary Hearing Was Required.

Appellee Sterrett argues in his Brief (pp. 7-9) that the judgment of the District Court should be construed as a dissolution of the three-judge panel, leaving the remaining issues for disposition by the single judge. The simple answer to this analysis is that, if the three-judge court had intended its jurisdictional finding as a finding under § 2281 in the sense of *Ex parte Poresky*, 290 U.S. 30 (1933), it would have so indicated and dissolved itself. As stated above, however, the three-judge panel made no determination that it had been improperly convened. The explanation for the court's action is not that it made a procedural error, but rather that its judgment was not based on a lack of jurisdiction within the meaning of *Poresky* and, therefore, dissolution would have been inappropriate.

This is made plain by the fact that, after an extensive evidentiary hearing, the court's *only* finding was that none of the claimants had exhausted her administrative remedies. The significance of this finding with respect to the court's ruling on substantiality is clarified by a consideration of *Metcalf v. Swank*, 305 F. Supp. 785 (N.D. Ill. 1969), one of the primary authorities cited and relied upon by the defendants below. The District Court in that case dismissed the complaint in part because it stated no substantial constitutional claim to "justify the assumption of jurisdiction ** * * absent exhaustion of available state administrative remedies.*" (305 F. Supp. at 791) (emphasis added). The judgment herein is similarly inextricably based on the absence of exhaustion and is internally consistent only when so construed.

A judgment that a constitutional question is rendered insubstantial by a failure to exhaust administrative remedies is *not* a decision of the *Poresky* type which defeats § 1253

jurisdiction. A determination that exhaustion is required or that its absence renders constitutional questions insubstantial may not be made by a single judge, *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), and the three-judge court was therefore properly convened to hear and determine this issue.[1] The sole review of such a judgment is in this Court.

Secondly, even if it is assumed for the sake of argument that the District Court held that the complaint did not pass the *Poresky* test, it must be concluded that the three-judge court was nevertheless properly convened since its decision required an extensive examination of the facts. The court did not reach its decision that the *pleadings* presented no substantial federal question solely by an examination thereof and oral argument.[2] In rendering its judgment, the court heard ten witnesses for the plaintiffs and six witnesses for the defendants. Any resolution of the issue of substantiality which demands such an evidentiary hearing is *solely* the function of the three-judge panel. *Gong v. Kirk*, 375 F.2d 728 (5th Cir. 1967); *cf. Calloway v. Briggs*, 443 F.2d 296 (6th Cir. 1971).

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[1]Under such analysis, the actions of the three-judge panel in deciding the statutory issue, which would otherwise be for a single judge, and in dismissing the complaint by an order signed by three judges become proper and understandable.

[2]It is absolutely plain that the court's entry with respect to substantiality is limited to the pleadings, as affected by the failure to exhaust administrative remedies. The Amended Entry reads: "We have examined the pleadings before us and find no substantial federal question involved * * *." (App. 212). Sterrett's assertion that the court must have resolved all conflicts in the evidence in his favor (Appellee's Brief p. 14) is, therefore, misconceived.

C. The Question of Whether the Three-Judge Court Was Properly Convened Is A Question for Determination by This Court.

Even if for the sake of argument it is conceded that appellee Sterrett's interpretation of *Wilson* and *Mengelkoch* and the lower court's decision is correct, there is a fundamental defect in the argument made by appellee. That argument appears to assume that, in determining its own jurisdiction to hear this appeal, this Court is bound by the determination made by the District Court. It is elementary, however, that in deciding the question of its own jurisdiction under § 1253 this Court will consider itself the question of whether the three-judge court was properly convened. As stated by Mr. Justice Brandeis in *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934):

> "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."

See, also, *Defiance Water Co. v. Defiance*, 191 U.S. 184 (1903) and *Continental Nat. Bank v. Buford*, 191 U.S. 119 (1903).

Thus, the question of whether the complaint herein presented a substantial constitutional question and, hence, of whether the three-judge court was properly convened will be considered anew by this Court in determining its own jurisdiction. This procedure was followed in *Schneider v. Smith*, 390 U.S. 17 (1968), *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), *United States v. Georgia Pub. Serv. Comm'n.*, 371 U.S. 285 (1963), and *Water Service Co. v. Redding*, 304 U.S. 252 (1938), in each of which cases this Court determined for itself whether the constitutional questions presented were or were not substantial. By the same token, the issue of whether three-judge courts were properly convened was considered and decided on other grounds in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), *Flast v. Cohen*, 392 U.S. 83 (1968), *Moody v. Flowers*, 387 U.S. 97 (1967), *Pennsylvania P.U.C. v. Pennsylvania R.R.*,

382 U.S. 281 (1965), and *Florida Lime Growers v. Jacobsen*, 362 U.S. 73 (1960).

Accordingly, the decision of the District Court is by no means dispositive on the issue of this Court's jurisdiction, and, for the reasons set forth in Appellant's Brief, it should determine that substantial constitutional questions have been presented for decision.

II

A FINAL JUDGMENT DISMISSING A COMPLAINT IS AN ORDER DENYING AN INJUNCTION

Appellee Sterrett's second argument is apparently premised on the proposition that only an order denying an injunction on the merits is an "order" permitting a direct appeal under § 1253. No intent so to limit direct appeals is evidenced by the language of the statute. A final judgment dismissing a complaint has the same effect as an order denying an injunction on the merits, and it should be so treated for purposes of § 1253.

This Court has in recent years accepted on direct appeal judgments of three-judge courts dismissing actions for failing to present a case for federal relief, *Samuels v. Mackell*, 401 U.S. 66 (1971) and *Black Unity League v. Miller*, 394 U.S. 100 (1969), for failure to state a claim upon which relief could be granted, *Lewis v. Martin*, 396 U.S. 900 (1970) and *Moore v. Ogilvie*, 394 U.S. 814 (1969), for failure to present a substantial constitutional question, *Watermeier v. Louisiana Stadium and Exposition District*, 398 U.S. 955 (1970), *Sullivan v. Alabama State Bar*, 394 U.S. 812 (1969) and *Whitney Stores, Inc. v. Summerford*, 393 U.S. 9 (1968), for lack of standing, *Granite Falls State Bank v. Schneider*, 402 U.S. 1006 (1971), *Richardson v. Kennedy*, 401 U.S. 901 (1971) and *Flast v. Cohen*, 392 U.S. 83 (1968), for lack of subject matter jurisdiction, *Hornbeak v. Hamm*, 393 U.S. 9 (1968), for lack of a case or controversy, *Florida Lime Growers v. Jacobsen*, 363 U.S.

73 (1960), and under the abstention and political question doctrines. *Zwickler v. Koota*, 389 U.S. 241 (1967); *Baker v. Carr*, 369 U.S. 186 (1962). These cases conclusively demonstrate that any final judgment of dismissal entered by a three-judge court which, in effect, denies the request for an injunction is an "order" within the scope of § 1253.

CONCLUSION

The jurisdiction of this Court has been properly invoked under 28 U.S.C. § 1253, and it should proceed to the merits of this appeal and reverse the judgment of the District Court.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1253.

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 U.S.C. § 2281.

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."